In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 500

FENIX AND SCISSON, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims allowance of a deduction in its taxable year ending October 31, 1958, representing the carryover of net operating losses incurred in prior years by another corporation (Oronogo Mutual Mining Company), the stock of which petitioner purchased on October 14, 1955, and which was merged into petitioner on October 31, 1957. The sole question presented is whether the loss carryover deduction is barred by Section 382(a) of the Internal Revenue Code of 1954 (Appendix, *infra,* pp. 9–10), which disallows such deduction if there is a 50 percent or more change in stock ownership of a corporation coupled with a failure by such corporation to continue to carry on a trade or business substantially the same as that

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conducted before any change in stock ownership. The admitted requisite change of stock ownership in this case further narrows the issue to whether Oronogo continued to carry on after October 14, 1955 (the date of the change) the same business that it conducted before. The district court submitted this issue to a jury in the following interrogatory (R. 20):

> Was the Oronogo Mutual Mining Company carrying on a trade or business at the time of acquisition by plaintiff and if so did the Oronogo Mutual Mining Company continue for the period of one taxable year after the taxable year in which it was acquired by the plaintiff to carry on substantially the same trade or business as that conducted by it prior to such acquisition?

Upon the jury's affirmative answer to this interrogatory, judgment was entered for petitioner. The court of appeals held, however, that the first condition of deductibility—that Oronogo be engaged in a trade or business on the date that its stock was acquired by petitioner—was not satisfied as a matter of law. As the court of appeals observed (360 F. 2d 260, 268), the evidence "leads only one way which is that prior to October 14, 1955, Oronogo was no longer engaged in any trade or business and the jury verdict to the contrary must be set aside as a matter of law." The court below did not reach the question whether Oronogo had continued to carry on the same business after petitioner's acquisition of its stock, since it had no business to carry on (Pet. A25). Accordingly, the court of appeals reversed the judgment of the

district court on the net operating loss carryover issue and remanded the case with instructions to enter a judgment consistent with its opinion.

The decision of the court of appeals is correct, and there is no conflict of appellate court decisions or any other reason for further review.

1. As its primary argument, petitioner contends that the reversal by the Tenth Circuit of a factual issue determined by a jury effectively deprived it of the right to trial by jury.[1] It is settled, however, that where there is no evidence to support the jury's conclusion, reversal on appeal is proper. *Lavender* v. *Kurn,* 327 U.S. 645, 653. The right to a jury trial clearly does not insulate the jury's verdict from appellate review. *Sentilles* v. *Inter-Caribbean Shipping Corp.,* 361 U.S. 107, 110. The crucial issue in all such cases is whether the appellate court has applied the correct legal standard, *i.e.,* that the jury verdict may be overturned only when the evidence is such that no fair-minded men could rationally arrive at such a verdict. That was the standard announced and applied by the court of appeals in the present case (Pet. A11).

2. The undisputed facts leave no doubt as to the correctness of the court of appeals' conclusion that Oronogo was not conducting an active trade or business at the time of the change in its ownership. On that date, October 14, 1955, Oronogo had not mined any lead or zinc (its principal products during its

[1] Under 28 U.S.C. 2402, as amended in 1954, which gives taxpayers the right to a jury trial in actions against the United States for tax refunds, and not as a matter of constitutional right.

successful years and the principal purpose for which the company was organized) for more than seven years (R. 79, 97–100, 106, 128). It had not mined any substantial quantity of ore for at least six years, and it had not mined any ore at all for at least four years (Pet. A13). Indeed, Oronogo had done no mining after 1951; its lead and zinc mines were flooded with water (which could be pumped out over a period of time ranging from 60 to 120 days, at a cost of about $64,000), and its coal mine was shut down. After 1953, Oronogo made no sales of gravel or chat, and its sand and gravel plants and equipment had been sold when in August 1953 its directors and shareholders adopted a resolution to dissolve and liquidate the company. This resolution (not rescinded until October 1955, just prior to the stock acquisition by petitioner) declared (Pet. A15) that "the Company has disposed of its last business operation" and that there remained "no further reason for the continuance of the corporate business and/or existence * * *."

Following unsuccessful efforts in 1952 and 1953 to dispose of its assets in bulk, Orongo's activities, prior to October 1955, amounted to a piecemeal liquidation of its assets (Pet. A14, A23). Prior to its acquisition by petitioner Oronogo had two employees, a bookkeeper and a mechanic, and paid various fixed expenses such as insurance, taxes, depreciation and wages, but its 1955 federal tax return disclosed no rental income and it was not in the business of renting what equipment it had left (Pet. A14, A24–A25). On the above facts, it is clear that Oronogo was an

inactive corporation on October 14, 1955, and that no reasonable jury could have concluded that Oronogo was actively conducting a trade or business as of that date. With all the evidence so clearly pointing one way, there remained no triable question of fact for the jury to determine, and the court below cannot be regarded as having preempted the jury's fact-finding task.

3. Petitioner also criticizes the court below for having even considered the pertinent Treasury Regulation promulgated under Section 382(a), on the ground that the regulation, Treasury Regulations on Income Tax (1954 Code), Section 1.382(a)-1(h)(6) (Appendix, *infra*, p. 10), was not promulgated until 1962 (Pet. 22–23). The short answer to this contention is that the court of appeals merely regarded the regulation as relevant, and "by no means" rested its decision on the language of the regulation which explicitly denies the loss carryover deduction where the loss corporation is "inactive" at the time of the change in its ownership (Pet. A22). Furthermore, this regulation was made retroactive to relate to the year 1955,[2] and is entirely compatible with the statute. See *Glover Packing Co. of Texas* v. *United States*, 328 F. 2d 342, 347–348 (Ct. Cl.).[3]

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[2] There is no doubt, as the court of appeals noted (Pet. A22, n. 9), that the Commissioner of Internal Revenue has authority under Section 7805(b) of the 1954 Code to decide whether or not Treasury Regulations are to be given retroactive effect.

[3] Likewise, petitioner's attack on the sufficiency of the grounds stated in the government's motion for judgment *n.o.v.* is overly technical and was properly rejected by the court below.

4. This case has no more administrative importance than any other case decided upon factual issues. If, as petitioner incorrectly suggests, an important question of statutory construction were presented, *i.e.*, whether an inactive corporation (at the time of change in stock ownership) loses all potential for generating the tax benefit of a net operating loss carryover, petitioner has no standing to raise the question here, having failed to object to the instructions and interrogatory given to the jury by the district court. Beyond that, however, the terms of Section 382(a) disallowing the carryover if the corporation "has not continued to carry on a trade or business" plainly disqualify inactive corporations. A business which is not going on cannot, under any logical construction, be said to have "continued". This interpretation of Section 382(a) has substantial judicial support. *Glover Packing Co. of Texas* v. *United States, supra; Fawn Fashions, Inc.* v. *Commissioner,* 41 T.C. 205, 213–214; *H. F. Ramsey Co.* v. *Commissioner,* 43 T.C. 500, 514–515.

5. Finally, the mere fact that a corporation is ready to engage in business would not lead to the conclusion that that corporation is *carrying on* a trade or business, particularly if such a situation has persisted for a long period of time. Nor does having a net worth of a certain amount, or negotiating with respect to the possibility of resuming business operations, lend much support to such a conclusion. All of these points were adequately considered by the court below (Pet. A23–A24); indeed, the court of appeals wrote a thorough and extensive opinion

which adequately answered all of the questions raised by petitioner. On the facts of this case, if Oronogo could properly be found to be carrying on a trade or business at the time of its acquisition, then the statutory requirement for the continuance thereof would be rendered virtually meaningless, since almost any corporation which had maintained its formal existence and retained some of its assets would qualify. Congress hardly intended such a result in enacting Section 382(a).

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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